

statements fail the *Pickering* balancing test since the government's efficiency interests far outweigh the Member's free speech interests.

Title VII Hostile Work Environment

Under Title VII, employers may not “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.”¹ An “employer” is “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person.”² The application of Title VII is not limited to “tangible” or “economic” discrimination and was applied to harassment in the workplace in the context of race, religion, and national origin during the 1970s by various federal circuit and district courts.³ In *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court held that sex discrimination that creates a hostile work environment violates Title VII, firmly establishing that a hostile work environment violates Title VII.⁴ Employers are also liable for a constructive discharge if it occurs as a result of harassment.⁵

Title VII Definition of Employee

Under statute, an employee “means an individual employed by an employer, except that the term ‘employee’ shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The

¹ 42 U.S.C. § 2000e-2(a)(1).

² 42 U.S.C. § 2000e(b).

³ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64-66 (1986).

⁴ *Id.* at 66-67.

⁵ *Pa. State Police v. Suders*, 542 U.S. 129, 143 (2004).

exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.”⁶ The Supreme Court holds that defining an employee as “an individual employed by an employer” is circular and that the common law of agency should be used as outlined in *Nationwide Mutual Insurance Company v. Darden*⁷ to define who is an employee.⁸

Under *Darden*, courts “consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.”⁹

While the complainant is clearly an employee here, the Sixth Circuit has held that when nuns did not receive a regular salary, did not receive regular benefits such as medical, vision or dental insurance, nor were treated as employees for income tax purposes, it suggested that they were not employees.¹⁰ Significant discretion and flexibility over work, as well as lack of economic reliance, also suggests that the nuns were not employees even if the employer did set a

⁶ 42 U.S.C. § 2000e(f).

⁷ 503 U.S. 318 (1992).

⁸ *Bryson v. Middlefield Volunteer Fire Dep't, Inc.*, 656 F.3d 348, 352-53 (6th Cir. 2011).

⁹ *Id.* at 352 (internal quotations omitted).

¹⁰ *Marie v. Am. Red Cross*, 771 F.3d 344, 354-56 (6th Cir. 2014).

schedule.¹¹ However, volunteering in an area related to the regular business of employer, does suggest that the volunteer should be considered an employee.¹²

Title VII Elements

To establish liability for a hostile work environment, a plaintiff must show that “(1) he belongs to a protected group; (2) he was subject to unwelcome harassment; (3) that harassment was based on” a protected classification under Title VII; “(4) the harassment was sufficiently severe or pervasive to alter the conditions of his employment; and (5) the employer knew or should have known about the harassment and failed to take appropriate remedial action.”¹³ When evaluating whether a work environment is hostile or abusive under Title VII, the court looks to all the circumstances and no single factor is required.¹⁴ Examples of circumstances that could be considered include “frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.”¹⁵ To establish a violation, a reasonable person must find the environment to be hostile or abusive and the victim must perceive the environment as hostile or abusive. Otherwise, the conditions of the victim’s employment have not changed and there is no violation.¹⁶ Generally, simple teasing, off-hand comments, and isolated incidents, unless they are egregious, are not considered sufficient to change the terms and conditions of employment in

¹¹ *Id.* at 357-58.

¹² *Id.* at 359.

¹³ See *Strickland v. City of Detroit*, 995 F.3d 495, 503 (6th Cir. 2021) (citing *Khalaf v. Ford Motor Co.*, 973 F.3d 469, 482 (6th Cir. 2020)) (using race as the example classification).

¹⁴ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

¹⁵ *Id.*

¹⁶ *Id.* at 21-22.

a way that violates Title VII.¹⁷ The Sixth Circuit has held that five incidents in fifteen months, for example, was not enough to show a hostile work environment.¹⁸

Title VII Employer Vicarious Liability

Employers are vicariously liable under Title VII if a supervisor creates a hostile work environment for employee(s) that they have immediate or successively higher authority over.¹⁹ An individual is classified as a supervisor “for purposes of vicarious liability under Title VII if” they are “empowered by the employer to take tangible employment actions” against the plaintiff.²⁰ No affirmative defense is available if the harassment results in a tangible employment action such as “discharge, demotion, or undesirable reassignment.”²¹ If no tangible employment action is taken, defendants may raise an affirmative defense by proving “that the employer exercised reasonable care to prevent and correct promptly” any harassing behavior and “that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”²² While the plaintiff has the duty to mitigate harm, the defendant has the burden to prove that plaintiff did not mitigate harm.²³

If the harasser is not a supervisor, an employer is still vicariously liable if the plaintiff shows that the employer was negligent in their prevention of harassment.²⁴ For example, “[e]vidence that an employer did not monitor the workplace, failed to respond to complaints,

¹⁷ *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

¹⁸ *Nathan v. Great Lakes Water Auth.*, 992 F.3d 557, 568 (6th Cir. 2021) (holding that five instances of sexually harassing comments and actions did not establish a violation of Title VII).

¹⁹ *Faragher*, at 807; *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998).

²⁰ *Vance v. Ball State Univ.*, 570 U.S. 421, 450 (2013).

²¹ *Faragher*, 524 U.S. at 808; *Ellerth*, 524 U.S. at 765.

²² *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

²³ *Suders*, 542 U.S. at 152.

²⁴ *Vance*, 570 U.S. at 448-49.

failed to provide a system for registering complaints, or effectively discouraged complaints from being filed” could be used to show liability.²⁵

Here, the Member is not the supervisor of the complainant, and the complainant presents no specific evidence that Member’s comments were linked to his race or any other protected category under Title VII. The Member has commented on other police officers and the police department generally in the past which weighs against the idea that her defamation was racially motivated. There was a complaint system in place so it would be extremely difficult for the complainant to show negligence since City does not have the authority to remove the Member and City took all other reasonable measures.

ELCRA Hostile Work Environment

Under the Elliott-Larsen Civil Rights Act (ELCRA), an employer may not “[f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.”²⁶ An “employer” in this context means “a person who has 1 or more employees, and includes an agent of that person.”²⁷ To establish a claim of discrimination, plaintiffs have to show that they belong to a protected group, that they were subjected to communication or conduct based on their protected status that was unwelcome, that said conduct contributed to a hostile work environment or substantially interfered with the plaintiff’s employment and that respondeat superior liability is established.²⁸

²⁵ *Id.*

²⁶ Mich. Comp. Laws § 37.2202(1)(a) (2021).

²⁷ Mich. Comp. Laws § 37.2201(a) (2021).

²⁸ *Quinto v. Cross & Peters Co.*, 547 N.W.2d 314, 319-20 (Mich. 1996) (citing *Radtke v. Everett*, 501 N.W.2d 155, 162 (Mich. 1993)).

ELCRA Definition of an Employee

The correct test to determine whether an employee is employed by a particular employer under ELCRA is the “economic reality” test.²⁹ The economic realities test considers the control over the employee, the payment of wages, the right to hire and fire and discipline and the performance of duties as an integral part of an employer’s business towards a business goal to determine if an individual is an employee.³⁰ The complainant easily meets this test as a police officer for the city.

ELCRA Respondeat Superior Liability

Respondeat superior liability under ELCRA is based on traditional agency principles which makes employers liable for the actions of employees done within the scope of employment.³¹ Employers are not typically liable for actions done beyond the scope of employment or for individual actions done to further the interests of the employee.³² However, employers can be vicariously liable if they should have known of the employee’s propensities and criminal record before an intentional tort was committed based on “actual or constructive knowledge” of prior conduct and propensity to act in accordance with such conduct.³³ Foreseeability is a critical component because otherwise the societal burden would be too great as employers would be liable for unpreventable harms and be deterred from hiring employees with less than impeccable backgrounds.³⁴ Since ELCRA incorporates agency principles within the language of the law, it is not intended to incorporate federal caselaw and the reasoning

²⁹ *Ashker ex rel. Estate of Ashker v. Ford Motor Co.*, 627 N.W.2d 1, 3 (Mich. Ct. App. 2001).

³⁰ *Clark v. United Techs. Auto., Inc.*, 594 N.W.2d 447, 451 (Mich. 1999) (citing *Askew v. Macomber*, 247 N.W.2d 288, 290 (Mich. 1976)).

³¹ *Hamed v. Wayne Cnty.*, 803 N.W.2d 237, 244 (Mich. 2011).

³² *Id.*

³³ *Id.* at 245.

³⁴ *Id.* at 246-47.

behind federal caselaw does not apply.³⁵ As a result, unlike under federal law, employers are not responsible for unforeseeable harassment committed outside of the scope of employment.³⁶ Particularly, in the area of sexual harassment, employer liability can only be established if the employer had reasonable notice of the sexual harassment and failed to take corrective action.³⁷ Notice requires that a reasonable employer would have been aware of a substantial probability that the harassment was occurring.³⁸

Like the Title VII claim, the complainant presents no specific evidence that Member's comments were linked to his race, or any other protected category. Furthermore, the Member's previous comments make it more likely that her statements were based on a general dislike of the police, so complainant's claim likely fails.

Defamation

The elements of defamation under Michigan caselaw are: “(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication.”³⁹ Under Michigan statutory law, “[w]ords imputing a lack of chastity to any female or male are actionable in themselves and subject the person who uttered or published them to a civil action for the slander in the same manner as the uttering or publishing of words imputing the commission of a criminal offense.”⁴⁰ Whether a statement is defamatory is a matter

³⁵ *Id.* at 251.

³⁶ *Id.* at 258.

³⁷ *Elezovic v. Ford Motor Co.*, 697 N.W.2d 851, 861 (Mich. 2005).

³⁸ *Id.*

³⁹ *Mitan v. Campbell*, 706 N.W.2d 420, 421 (Mich. 2005).

⁴⁰ Mich. Comp. Laws § 600.2911(1) (2021).

of law to be decided by the court.⁴¹ A substantially true statement prevents liability.⁴² “A defamation claim must be pleaded ‘with specificity by identifying the exact language that the plaintiff alleges to be defamatory.’”⁴³ “A communication is defamatory if, under all the circumstances, it tends to so harm the reputation of an individual that it lowers the individual's reputation in the community or deters others from associating or dealing with the individual.”⁴⁴ A defamatory statement must be evaluated based on its entire context.⁴⁵ To have a cause of action, plaintiff has to show that the defamatory statement can be proven false and that the statement states actual facts about plaintiff or could be reasonably interpreted as such.⁴⁶ For example, the Michigan Court of Appeals has held that claiming that a mother never spent any time with her child could be proven false but a reasonable person would not interpret such a statement literally and as such, it was not actionable for defamation.⁴⁷ Defendants are not liable for any speculations, inferences or conclusions if the defendant has not made or implied any false assertion and has not misleadingly conveyed a false implication.⁴⁸

Freedom of Information Act (FOIA)

Under Michigan’s FOIA, the governing body must respond to a request within five days, with a potential extension of ten days⁴⁹ but the law does not specify when the information requested must be disclosed so a delay is not necessarily unlawful, even if potentially annoying. If a delay is arbitrary and capricious, there is civil liability for the public agency but no mention

⁴¹ *Nichols v. Moore*, 477 F.3d 396, 399 (6th Cir. 2007) (citing *Fisher v. Detroit Free Press, Inc.*, 404 N.W.2d 765, 767 (Mich. Ct. App. 1987)).

⁴² *Nichols*, 477 F.3d at 399.

⁴³ *Ghanam v. Does*, 845 N.W.2d 128, 140 (Mich. Ct. App. 2014) (quoting *Thomas M. Cooley Law Sch. v. Doe 1*, 833 N.W.2d 331, 341 (Mich. Ct. App. 2013)).

⁴⁴ *Kefgen v. Davidson*, 617 N.W.2d 351, 356 (Mich. Ct. App. 2000).

⁴⁵ *Smith v. Anonymous Joint Enter.*, 793 N.W.2d 533, 549 (Mich. 2010).

⁴⁶ *Kevorkian v. Am. Med. Ass’n*, 602 N.W.2d 233, 236 (Mich. Ct. App. 1999).

⁴⁷ *Ireland v. Edwards*, 584 N.W.2d 632, 638 (Mich. Ct. App. 1998).

⁴⁸ *Locricchio v. Evening News Ass’n*, 476 N.W.2d 112, 139 (Mich. 1991).

⁴⁹ Mich. Comp. Laws § 15.235(2) (2021).

of civil or criminal liability for individuals⁵⁰ so it would not constitute pro se statutory defamation like an accusation of criminal activity would.⁵¹ As a result, the complainant must prove defamation through implication of the Member's statements.

Defamation of Public Officials

The Michigan Court of Appeals has held that a police lieutenant, like complainant here, can be considered as a public figure for purposes of defamation since their responsibilities exceed those of police officers on patrol and they are visible to the public.⁵² Under Michigan statutory law, defamation claims can only be sustained in regards to public officials "by clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether or not it was false."⁵³ This is a higher standard than for claims of defamation brought by private citizens, as those claims only require a showing of negligence.⁵⁴ Reckless disregard exists when the publisher of an statement entertained serious doubts about the truth of the statement when they made them.⁵⁵

Since the complainant must prove actual malice, the complainant might have difficulties bringing a claim as he must show that the Member doubted the truth of her statements before she made them. Additionally, the complainant must show that Member's statements imply that his wife would slow down FOIA requests if annoyed, that his wife has never slowed down FOIA requests and that a reasonable person would believe that complainant's wife would slow down FOIA requests based on the Member's statements. Although Human Resources found the

⁵⁰ Mich. Comp. Laws § 15.240(7) (2021).

⁵¹ See Mich. Comp Laws § 600.2911(1) (2021) (stating that accusation of criminal activity would be slander).

⁵² *Tomkiewicz v. Detroit News, Inc.*, 635 N.W.2d 36, 43 (Mich. Ct. App. 2001).

⁵³ Mich. Comp. Laws § 600.2911(6) (2021).

⁵⁴ § 600.2911(7).

⁵⁵ *Tomkiewicz*, 635 N.W.2d at 46.

complainant's complaint to be valid, it is unclear if that would be enough to prove a claim that the Member committed defamation and was deliberately being untruthful.

Statutory Qualified Immunity

Members of Commission are appointed with the approval of City Council by City Council liaisons to the Human Rights Commission or liaisons to Commission.⁵⁶ For members of City Council, qualified immunity exists for negligent torts committed during the course of employment “if (a) the employee ‘is acting or reasonably believes he or she is acting within the scope of his or her authority,’ (b) the agency that the employee serves ‘is engaged in the exercise or discharge of a governmental function,’ and (c) the employee’s ‘conduct does not amount to gross negligence that is the proximate cause of the injury or damage.’”⁵⁷ A governmental function is an “activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law.”⁵⁸ Gross negligence is “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.”⁵⁹ Proximate cause is the “most immediate, efficient, and direct cause preceding an injury.”⁶⁰ There’s no indication that appointing the Member was reckless in a way that was grossly negligent unless the Member had a long history of defamation and similar torts before her appointment and the City Council members knew about it. However, even in this case, the City Council members could still show that the proximate cause of the defamation was not the Member’s appointment to Commission and still attain qualified immunity. Notwithstanding, governmental employers are not liable for

⁵⁶ Ann Arbor, MI., Code § 1:214(1) (2021).

⁵⁷ *Odom v. Wayne Cnty.*, 760 N.W.2d 217, 222-23 (Mich. 2008) (citing Mich. Comp. Laws § 691.1407).

⁵⁸ Mich. Comp. Laws § 609.1401(b) (2021).

⁵⁹ § 691.1407(8)(a).

⁶⁰ *Robinson v. City of Detroit*, 613 N.W.2d 307, 317 (Mich. 2000).

the intentional torts of their employees so City Council members cannot be vicariously liable for the Member's actions.⁶¹

For intentional tort claims, like the defamation claim against the Member here, Michigan courts apply the *Ross*⁶² test to determine if qualified immunity is present.⁶³ Under the *Ross* test, defendants are entitled to qualified immunity if “(a) [t]he acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority, (b) the acts were undertaken in good faith, or were not undertaken with malice, and (c) the acts were discretionary, as opposed to ministerial.”⁶⁴ Discretionary acts “require personal deliberation, decision and judgment.”⁶⁵ A defendant fails to meet the “good faith” standard if they “act maliciously, recklessly, capriciously, or willfully and corruptly.”⁶⁶ Discretionary acts “require personal deliberation, decision and judgment.”⁶⁷

Commission is authorized to host educational sessions with community groups as part of fulfilling its objectives, so the Member is acting within the scope of her employment.⁶⁸ The acts are discretionary because the Member is speaking according to her own judgment and City Council is not controlling her discussion session. However, the question of whether she acted in good faith may preclude her from claiming qualified immunity as Human Resources has found complainant's complaint to be valid, which indicates the Member's statements are likely not entirely truthful or she might have been speaking recklessly.

Removal/First Amendment Claim

⁶¹ *Mays v. Snyder*, 916 N.W.2d 227, 266 (Mich. Ct. App. 2018).

⁶² *Ross v. Consumers Power Co.*, 363 N.W.2d 641 (Mich. 1984) (per curiam).

⁶³ *Odom*, 760 N.W.2d at 224.

⁶⁴ *Id.* at 228.

⁶⁵ *Odom*, 760 N.W.2d at 226 (quoting *Ross*, 363 N.W.2d at 668).

⁶⁶ *Peterson v. Heymes*, 931 F.3d 546, 557 (6th Cir. 2019) (citing *Odom*, 760 N.W.2d at 224-25).

⁶⁷ *Odom*, 760 N.W.2d at 226 (quoting *Ross*, 363 N.W.2d at 668).

⁶⁸ Ann Arbor, MI Code § 1:217(1) (2021).

City Council can remove a member of any commission for cause.⁶⁹ Here, City Council may have a “for cause” reason for removal of the Member since a purpose of Commission is “[t]o improve and strengthen police-community relations” and the Member undermines this purpose through her comments about the complainant and other police officers.⁷⁰ When government employees makes statements pursuant to their official duties, they are not entitled to the citizen protections of the First Amendment and are not insulated from employer discipline.⁷¹ Similarly, government employees do not gain First Amendment protection if they were not speaking on a matter of public concern, even if they were speaking as a private citizen.⁷² Here, the Member made her statements at a public event as a member of Commission which was a part of her official duties so she is likely not entitled to First Amendment protection notwithstanding the nature or content of her statements.

Alternatively, if the Member manages to show that she made her statements as a private citizen, then she must show that she made the statements on a matter of public concern to be entitled to First Amendment protection.⁷³ A matter of public concern is information that relates to a matter of political, social or some other concern that helps citizens make informed decisions about their government, such as the disclosure of wrongdoing.⁷⁴ Controversial parts of a speech that advance only a private interest are not entitled to First Amendment protection, but the entire speech does not have to relate to a matter of public concern to be protected.⁷⁵ Human Resources’ finding that the complaint against the Member was valid might preclude her from claiming First

⁶⁹ Ann Arbor, MI Code § 1:171(3) (2021).

⁷⁰ Ann Arbor, MI Code § 1:212(1) (2021).

⁷¹ *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

⁷² *Id.* at 418.

⁷³ *Id.*

⁷⁴ *Gillis v. Miller*, 845 F.3d 677, 689 (6th Cir. 2017).

⁷⁵ *Id.*

Amendment protection for that portion of her statements since targeting complainant might advance a private interest and is controversial.

Aside from that portion of her statements discussed above, alleged delays in FOIA requests seem to be a matter of public concern as a delay in the release of information would negatively impact the public. However, this does not end the inquiry. Courts then use the *Pickering*⁷⁶ balancing test to determine whether an employee's free speech interests outweigh the government's interests for efficiency.⁷⁷ The considerations for the balancing test are whether the statements impair discipline by superiors or sow disharmony among co-workers, has a detrimental impact on close working relationships, impedes the performance of the speaker's duties and undermines the mission of the employer.⁷⁸ Here, the Member sowed disharmony and had a detrimental impact on close working relationships by spreading false information about complainant, complainant's wife and the police in regards to FOIA disclosures. Human Resources found the complaint against the Member to be valid which supports that her statements were likely false. This not only undermines the relationship between the police and Commission, which impedes the Member's duties, but also potentially undermines the relationship between the police and City Council. Particularly, the goal of Commission is to work with the police to reduce undue use of force and foster better communication and understanding between police and community members.⁷⁹ The Member's statements could be seen as achieving the opposite. If the Member is not removed or curtailed, the police may see City Council's reluctance to act as being unsupportive or uncaring of the police. This could further undermine the relationship between City Council and the police. These concerns far

⁷⁶ *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

⁷⁷ *Gillis*, 845 F.3d at 684.

⁷⁸ *Bennett v. Metro. Gov't of Nashville & Davidson Cnty.*, 977 F.3d 530, 540 (6th Cir. 2020).

⁷⁹ Ann Arbor, MI Code § 1:212(1), (2), (4) (2021).

outweigh the Member's free speech interests, especially since her statements are of questionable validity.

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 Date of BA/BS **May 2019**
 JD/LLB From **The University of Michigan Law School**
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 Date of JD/LLB **May 6, 2022**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **Michigan Technology Law Review**
 Moot Court Experience **Yes**
 Moot Court Name(s) **Campbell Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/
 Externships **Yes**

Post-graduate Judicial
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Specialized Work Experience

Recommenders

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References

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**This applicant has certified that all data entered in this profile and
any application documents are true and correct.**

June 03, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am a rising third-year law student at the University of Michigan Law School, and I am interested in a two-year clerkship in your chambers starting in 2022.

I have been interested in a clerkship ever since I worked at the Michigan Supreme Court last summer as a judicial intern for Justice Cavanagh. My assignments focused on drafting memos analyzing and summarizing cases on a range of issues. As a future litigator, I enjoyed the opportunity to view cases from a judge's perspective as well as the opportunity to work on a variety of issues within the law. Additionally, I found the experience to be extremely beneficial for refining my writing and legal analysis skills. During my time in law school, I worked in the Civil-Criminal Litigation Clinic where I drafted pleadings on behalf of clients in various matters and represented clients in court hearings. My clinical work provided me valuable litigation experience while also fostering my ability to prosper in a fast-paced environment. Additionally, this environment emphasized a high attention to detail, which has helped me succeed in law school and I believe will be helpful during my clerkship experience.

I have attached my resume, transcript, and a writing sample for your review. Letters of recommendation from the following individuals are also attached:

- Professor David Santacrose: dasanta@umich.edu, (734) 763-4319
- Professor Mark Osbeck: mosbeck@umich.edu, (734) 764-9337
- Brett DeGross: brettdegroff@gmail.com, (517) 763-8560

Thank you for your time and consideration.

Sincerely,
Josh Zhao

Josh Zhao

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EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL

Ann Arbor, MI

Juris Doctor

Expected May 2022

Journal: Michigan Technology Law Review, *Managing Executive Editor* (Vol. 28), *Executive Editor* (Vol. 27.2)

Activities: Campbell Moot Court Competition, *Quarterfinalist* (2020-21), *Marshal* (2019-20)

1L Oral Advocacy Competition, *Judge* (2021), *Competitor* (2020)

Corporate Counseling Competition, *Prize Winner* (2019)

Asian Pacific American Law Student Association

First Generation Law Students

Wolverine Street Law

MICHIGAN STATE UNIVERSITY

East Lansing, MI

Bachelor of Arts in Finance, *High Honor*

May 2019

Additional Major in Economics

Honors: Honors College, Beta Gamma Sigma, Phi Kappa Phi

EXPERIENCE

ANN ARBOR CITY ATTORNEY'S OFFICE

Ann Arbor, MI

Legal Intern

May 2021 – Present

- Researched case law related to qualified immunity to summarize for city attorneys in a memo.

UNIVERSITY OF MICHIGAN CIVIL-CRIMINAL LITIGATION CLINIC

Ann Arbor, MI

Student Attorney

August – December 2020

- Drafted pleadings and briefs on behalf of indigent clients in civil and criminal cases.
- Counseled clients on the best course of action in their cases.
- Represented clients in court hearings and in negotiation with opposing counsel.
- Analyzed tenancy documents to ensure landlords treated tenants fairly and to prevent eviction.

MICHIGAN SUPREME COURT

Lansing, MI

Judicial Intern for Justice Megan K. Cavanagh

May – July 2020

- Drafted memos analyzing and summarizing cases for Justice Cavanagh and gave a recommendation on whether to hold the case for oral argument or deny leave to appeal.
- Analyzed cases dealing with a range of issues such as ineffective assistance of counsel, sentencing guidelines, sufficiency of evidence, summary disposition, property rights and sovereign immunity.
- Studied case reports prepared by commissioners along with lower court opinions for cases being appealed to the Michigan Supreme Court.

MICHIGAN STATE UNIVERSITY SPEECH PERCEPTION-PRODUCTION LAB

East Lansing, MI

Research Assistant

September 2017 – July 2019

- Presented research findings documenting the relationship between speech rate and speech perception to audiences with varying levels of knowledge about the topic.
- Collaborated with fellow lab members to schedule research participants and run experiments.

ADDITIONAL

Interests: College football, March Madness college basketball, trivia competitions/fun facts

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The University of Michigan Law School Cumulative Grade Report and Academic Record

Name: Zhao, Joshua Wentao
Student#: 81655710



University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credits Towards Program	Grade
Fall 2019 (September 03, 2019 To December 20, 2019)								
LAW	510	003	Civil Procedure	Nicholas Bagley	4.00	4.00	4.00	B+
LAW	530	004	Criminal Law	David Uhlmann	4.00	4.00	4.00	B+
LAW	580	004	Torts	Margo Schlanger	4.00	4.00	4.00	B
LAW	593	015	Legal Practice Skills I	Mark Osbeck	2.00	2.00	2.00	S
LAW	598	015	Legal Pract:Writing & Analysis	Mark Osbeck	1.00	1.00	1.00	S
Term Total				GPA: 3.200	15.00	12.00	15.00	
Cumulative Total				GPA: 3.200		12.00	15.00	
Winter 2020 (January 15, 2020 To May 07, 2020)								
<i>During this term, a global pandemic required significant changes to course delivery. All courses used mandatory Pass/Fail grading. Consequently, honors were not awarded for 1L Legal Practice.</i>								
LAW	520	001	Contracts	Albert Choi	4.00		4.00	PS
LAW	540	005	Introduction to Constitutional Law	Julian Davis Mortenson	4.00		4.00	PS
LAW	594	015	Legal Practice Skills II	Mark Osbeck	2.00		2.00	PS
LAW	791	001	Environmental Crimes	David Uhlmann	3.00		3.00	PS
Term Total					13.00		13.00	
Cumulative Total				GPA: 3.200		12.00	28.00	

Continued next page >

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Control No: E183786201

Issue Date: 06/01/2021

Page 2

The University of Michigan Law School Cumulative Grade Report and Academic Record

Name: Zhao, Joshua Wentao
Student#: 81655710



Paul R. ...
University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Towards Program	Grade
Fall 2020 (August 31, 2020 To December 14, 2020)								
LAW	693	001	Jurisdiction and Choice Of Law	Mathias Reimann	4.00	4.00	4.00	P
LAW	723	001	Corporate Lawyer: Law & Ethics	Vikramaditya Khanna	4.00	4.00	4.00	B+
LAW	920	001	Civil-Criminal Litigation Cln	David Santacroce	4.00	4.00	4.00	A-
				Allison Freedman				
				Kimberly Thomas				
LAW	921	001	Civil-Criminal Litig Cln Sem	David Santacroce	3.00	3.00	3.00	A-
				Allison Freedman				
				Kimberly Thomas				
Term Total				GPA: 3.554	15.00	11.00	15.00	
Cumulative Total				GPA: 3.369		23.00	43.00	
Winter 2021 (January 19, 2021 To May 06, 2021)								
LAW	669	001	Evidence	Eve Primus	4.00	4.00	4.00	B+
LAW	716	001	Complex Litigation	Maureen Carroll	4.00	4.00	4.00	B+
LAW	731	001	Legal Ethics and Professional Responsibility	Bob Hirshon	2.00	2.00	2.00	A-
LAW	740	001	Tribal Law	Matthew Fletcher	3.00	3.00	3.00	B+
Term Total				GPA: 3.361	13.00	13.00	13.00	
Cumulative Total				GPA: 3.366		36.00	56.00	
Fall 2021 (August 30, 2021 To December 17, 2021)								
Elections as of: 06/01/2021								
LAW	435	001	Law Firm Careers/Evolv Prof	Bob Hirshon	3.00			
LAW	569	001	Legislation and Regulation	Daniel Deacon	4.00			
LAW	634	001	Water Wars/Great Lakes	Andrew Buchsbaum	3.00			
LAW	637	001	Bankruptcy	John Pottow	4.00			

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Page 3

The University of Michigan Law School Cumulative Grade Report and Academic Record

Name: Zhao, Joshua Wentao
Student#: 81655710



University Registrar

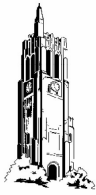
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MICHIGAN STATE UNIVERSITY

OFFICIAL ACADEMIC TRANSCRIPT
ISSUED TO STUDENT



PRINTED: 11/08/19

PAGE: 01 OF 01

UI C: 7910067959

ZHAO, JOSHUA WENTAO

STUDENT ID: A52418238

COURSE	TITLE	CRS	GRADE	S R	H	COURSE	TITLE	CRS	GRADE	S R	H
PREVIOUS/TRANSFER INSTITUTIONS HERBERT HENRY DOW HIGH SCHOOL ATTENDED: 09/11 - 06/15 MIDLAND MI						SPRING SEMESTER 2018 01/08/18 - 05/04/18					
UNDERGRADUATE CREDIT ADVANCED PLACEMENT						EC 302	INTERMEDIATE MACROECONOMICS	3	4.0		
MSU SEM CREDITS ACCEPTED: 23.00						EC 380	LABOR RELAT & LABOR MARKET POL	3	4.0		
UNDERGRADUATE CREDIT INTERNATIONAL BACCALAUREATE						EC 401	ADVANCED MICROECONOMICS	3	4.0		
MSU SEM CREDITS ACCEPTED: 8.00						FI 451	INTERNTL FINANCIAL MANAGEMENT	3	4.0		H
-----						CUM CREDITS : 117.0 CUM GPA : 3.9476					
UNDERGRADUATE CREDIT						DEAN'S LIST					
COURSE INFORMATION						FALL SEMESTER 2018 08/29/18 - 12/14/18					
FALL SEMESTER 2015 09/02/15 - 12/18/15						EC 335	TAXES, GOVERN SPEND & PUB POL	3	4.0		
ACC 201	PRINCIPLES OF FINANCIAL ACCT	3	4.0			EC 420	INTRO TO ECONOMETRIC METHODS	3	4.0		
BUS 170	STARTUP: BUSINESS MODEL DEVELO	1	4.0			EC 441	INTERNATIONAL FINANCE (W)	3	4.0		
EC 201	INTRODUCTION TO MICROECONOMICS	3	4.0			EC 491	ADVANCED TOPICS IN ECONOMICS	3	4.0		H
PSY 235	SOCIAL PSYCHOLOGY	3	4.0			CUM CREDITS : 129.0 CUM GPA : 3.9540					
WRA 195H	WRITING: MAJOR TOP AMER THGHT	4	4.0		H	DEAN'S LIST					
CUM CREDITS : 45.0 CUM GPA : 4.0000						SPRING SEMESTER 2019 01/07/19 - 05/03/19					
DEAN'S LIST						PHY 231C	INTRODUCTORY PHYSICS I	3	4.0		
SPRING SEMESTER 2016 01/11/16 - 05/06/16						CUM CREDITS : 132.0 CUM GPA : 3.9554					
ACC 202	PRINCIPLES OF MANAGEMENT ACCT	3	4.0			BACHELOR OF ARTS GRANTED: 05/03/19					
BUS 250	BUSINESS COMMUNICATIONS	3	4.0			MAJOR: FINANCE					
EC 202	INTRODUCTION TO MACROECONOMICS	3	4.0			COLLEGE: ELI BROAD COLLEGE OF BUSINESS					
GBL 295	LAW, POLICY AND ETHICS	3	4.0			WITH HIGH HONOR					
PLS 170	INTRO TO POLITICAL PHILOSOPHY	3	3.0		H	MEMBER OF THE HONORS COLLEGE					
CUM CREDITS : 60.0 CUM GPA : 3.8965						ADDITIONAL MAJOR UNDERGRADUATE GRANTED: 05/03/19					
DEAN'S LIST						MAJOR: ECONOMICS					
FALL SEMESTER 2016 08/31/16 - 12/16/16						COLLEGE: SOCIAL SCIENCE					
EC 340	SURVEY OF INTERNTL ECONOMICS	3	4.0			-----NO ENTRIES BELOW THIS LINE-----					
FI 311H	FINANCIAL MANAGEMENT	3	3.5		H						
FI 312	INTRODUCTION TO INVESTMENTS	3	4.0								
SCM 303	INTRODUCTION SUPPLY CHAIN MGT	3	4.0		H						
STT 315	INTRO PROB & STAT FOR BUSINESS	3	4.0								
CUM CREDITS : 75.0 CUM GPA : 3.8977											
DEAN'S LIST											
SPRING SEMESTER 2017 01/09/17 - 05/05/17											
ACC 305	INTERMEDIATE ACCT FINANCE MAJR	3	4.0								
FI 414	ADVANCED BUSINESS FINANCE (W)	3	4.0								
ITM 209	BUS ANALYTICS & INFO SYSTEMS	3	4.0								
MGT 315	MANAGING HUMAN RESOURCES	3	4.0								
MKT 317	QUANTITATIVE BUSINESS RES METH	3	4.0		H						
CUM CREDITS : 90.0 CUM GPA : 3.9237											
DEAN'S LIST											
FALL SEMESTER 2017 08/30/17 - 12/15/17											
EC 301	INTERMEDIATE MICROECONOMICS	3	4.0								
FI 413	MGT OF FINANCIAL INSTITUTIONS	3	4.0								
FI 473	DEBT AND MONEY MARKETS	3	4.0		H						
MGT 409	BUSINESS POL & STRATEGIC MGT	3	4.0								
MKT 300	MANAGERIAL MARKETING	3	4.0								
CUM CREDITS : 105.0 CUM GPA : 3.9391											
DEAN'S LIST											
-----END OF COLUMN-----											
						PROVIDED SOLELY FOR:					
						JOSHUA ZHAO					
						JOSH.ZHAO96@GMAIL.COM					
						551 SOUTH STATE STREET					
						ANN ARBOR, MI 48109					
						  Steven J. Shablin University Registrar					

MICHIGAN STATE UNIVERSITY

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Hannah Administration Building
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East Lansing, MI 48824-0210
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A transcript is official when it bears the signature of the University Registrar and the University seal in black ink, is obtained directly from the Office of the Registrar at Michigan State University, and is received by the person for whom it is intended. All paper-copy transcripts will be printed with black ink on paper with a green background which repeats "MICHIGAN STATE UNIVERSITY" over the entire page.

Calendar

The University offers instruction throughout the year during the fall semester, spring semester and summer sessions. Academic calendars are available at www.reg.msu.edu.

Credits

Effective Fall 1992 courses at Michigan State University are offered on a semester basis. One credit is equivalent to one instructor-student contact hour per week per semester plus two hours of study per contact hour; OR two hours of laboratory contact hours per week per semester, plus one additional hour spent in report writing and study; or other combinations of contact and study hours which constitute an equivalent of these experiences. Prior to Fall 1992 courses at Michigan State University were offered on a quarter basis.

To convert to quarter credits, the semester credits should be multiplied by 3/2.

Course Numbering System

001-099 – Non-Credit and Institute of Agricultural Technology Courses
100-299 – Undergraduate Courses
300-499 – Advanced Undergraduate Courses
500-599 – Graduate Courses prior to 1960
500-699 – Graduate – Professional Courses
800-899 – Graduate Courses
900-999 – Advanced Graduate Courses

Honors

An "H" in the Honors column indicates an honors course, honors section of a course, or the student took a non-honors course as honors. The latter indicates additional work was completed beyond normal requirements.

Grading System

The minimum cumulative grade-point average required for graduation is a 2.0 for undergraduate students and 3.0 for graduate students.

The Numerical System: 4.0, 3.5, 3.0, 2.5, 2.0, 1.5, 1.0, 0.0 – Credit is awarded for the following minimum levels – 1.0 for undergraduate students and 2.0 for graduate students. However, all grades are counted in the calculation of the grade-point average.

The Credit-No Credit System: CR-CREDIT – Credit was granted and represents a level of performance equivalent to or above the grade-point average required for graduation. NC-NO CREDIT – No credit was granted and represents a level of performance below the grade-point average required for graduation.

The Pass-No Grade System: P-PASS – Credit was granted and the student achieved a level of performance judged to be satisfactory by the instructor. N-NO GRADE – No credit was granted and the student did not achieve a level of performance judged satisfactory by the instructor.

Other Symbols Used: W-WITHDREW; V-VISITOR; U-UNFINISHED; I-INCOMPLETE; DF-DEFERRED; ET-EXTENSION; NGR-NO GRADE REPORTED; CP-CONDITIONAL PASS; & LDR-LATE DROP.

Grading Systems prior to Fall 1988: Please visit www.reg.msu.edu/transcripts.

Grade Point Average (GPA)

To compute the grade-point average for a semester, multiply the numerical grade by the number of credits for the course to obtain the total grade points. Then divide the total grade points by the total credits for the semester.

The minimum grade-point average required for graduation is 2.0 for undergraduate students and 3.0 for graduate students.

Courses in which P, I, N, DF, W, ET, CP, CR, NC, U or V have been received do not affect the grade-point average.

Grade Point systems prior to Summer 1972: Please visit www.reg.msu.edu/transcripts.

Repeated Courses

A course repeated is indicated in one of two ways:

1. By an R (Repeat) to the right of the "Descriptive Title", or

2. by an R (Repeat) in the SR column. In this case, you will also see an S (Superseded) in the SR column indicating the course being repeated.

For both formats term credit and grade-point average (GPA) totals are not adjusted for repeats in the term of the superseded course. The summary totals for the level of the student are adjusted to include only the last entry.

Withdrawal

A withdrawal from the University occurs when a student drops all courses within a semester. A student may voluntarily withdraw from the University prior to the end of the twelfth week of a semester or within the first 6/7 of the duration of the student's enrollment in a non-standard term of instruction (calculated in weekdays). Withdrawal is not permitted after these deadlines.

Courses in which the student is enrolled are deleted from the official record if the official voluntary withdrawal is before the middle of the term of instruction. If the official voluntary withdrawal is after the middle of the term of instruction, symbols are assigned by instructors to courses in which the student was enrolled as follows: W (no grade) to indicate passing or no basis for grade regardless of the grading system under which the student is enrolled, N to indicate failing in a course authorized for P-N grading, or 0.0 to indicate failing in a course authorized for numeric grading.

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UNIVERSITY OF MICHIGAN LAW
Legal Practice Program
625 South State Street
Ann Arbor, Michigan 48109-1215

Mark K. Osbeck
Clinical Professor of Law

June 01, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

A former student of mine, Josh Zhao, is applying to serve as one of your law clerks, and he has asked me to prepare a letter of recommendation on his behalf. I am happy to do so.

Mr. Zhao was a student in my two-semester Legal Practice class at Michigan. This class teaches first-year students the fundamentals of legal analysis, legal research, legal writing, oral argument, negotiation, and other skills related to the practice of law. Mr. Zhao was a very good student. He has strong research and analytical skills. He is also a skilled writer and an effective oral advocate. He expresses arguments clearly, and he demonstrates the ability to explain difficult concepts in a simple way. He is meticulous in his work.

I met with Mr. Zhao at length on several occasions during the class to discuss his work. In these discussions, he impressed me both with his thorough understanding of the legal issues involved, as well his ability to fairly evaluate both sides of an argument, while still forcefully articulating his position. That ability should prove a significant asset as a judicial clerk.

Mr. Zhao is also an amiable and sociable person. He has already garnered some very good experience during law school, such as the moot court competition and a corporate counseling competition. He also seems highly committed to career success as a lawyer. And finally, Mr. Zhao strikes me as a person of high character and integrity.

In sum, I am confident that Mr. Zhao will make a very good judicial clerk, and I am pleased to recommend him to you. Please do not hesitate to e-mail or call me if I can answer any questions you might have about Mr. Zhao.

Sincerely,

/Mark K. Osbeck/

Mark K. Osbeck
Clinical Professor of Law

Mark Osbeck - mosbeck@umich.edu - 734-764-9337

June 01, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write as a reference for Josh Zhao for a clerkship with the Court. Josh was a solid student who I believe would make a fine clerk with the court.

Josh was my student in the in the Civil-Criminal Litigation Clinic here at the University of Michigan Law School in the fall of 2020. During that time Josh practiced law under my supervision as a "first chair" attorney. He worked on a variety of cases, some simple, some complex. Enrollment in the Clinic also involved 4 hours of class each week thus giving me a great opportunity to observe him at work in a variety of contexts. In both class and practice, Josh did well.

Josh worked with me on several cases. One of them involved a novel issue that required a considerable amount of research. He was very strong in this area. He was able to hone the issues and marshal the law very aptly. His writing was above average and improved over the course of the semester. He collaborated well with his partner and clinic staff throughout the course of the semester. I have no doubt that he'll continue to grow over the course of his career.

If you need more or different information, please feel free to call or e-mail me.

Sincerely yours,
David A. Santacroce, Esq.
Clinical Professor of Law
Director, Civil/Criminal Litigation Clinic
University of Michigan Law School
dasanta@umich.edu

David Santacroce - dasanta@umich.edu - 734-763-4319

Brett DeGroff

4224 Shoals Drive, Okemos MI, 48864 // 517-763-8560 // brettdegroff@gmail.com

March 9, 2021

Dear Judge,

I would like to write to recommend Josh Zhao for a clerkship position. Mr. Zhao interned in our office last semester and impressed us with both his diligence and ability. At a time when the pandemic made everything a little more complicated, Mr. Zhao was able to persevere.

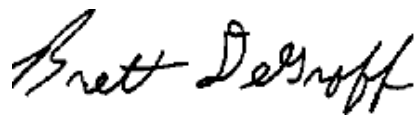
Normally, our interns spend their time reviewing applications for leave to appeal and making a recommendation to Justice Cavanagh. Normally, they work in our office and have access to materials in the file as well as clerks who work closely on the cases. Normally, we break up the summer with social opportunities with interns from other offices, as well as out-of-the office legal experiences. But, there was nothing normal about the summer Mr. Zhao spent with us.

The pandemic made it impossible to coordinate any of the “extras” we try to do for interns. The summer was all leave applications, all the time. And that work was complicated by the fact that interns did not have easy access to either court resources or clerks supervising them on their cases which they would normally have. Combine that with the challenges the pandemic posed for all of us, and it would have been easy for Mr. Zhao to just phone-in the summer. He did not.

Despite communication challenges posed by the pandemic, Mr. Zhao worked diligently and closely with the clerks who supervised his cases. His analysis was comprehensive, in-depth, and thoughtful. He demonstrated proficiency at both legal research and writing which is so critical for a law clerk. In addition to completing the cases he was assigned, he completed additional work on a larger ongoing research project, which was completely optional. Mr. Zhao worked well with the other interns, as well as the clerks, judicial assistant, and Justice Cavanagh.

Mr. Zhao did excellent work for us over the summer, and I'm happy to recommend him for a clerkship.

Very truly yours,



Brett DeGroff
Senior Clerk to Michigan Supreme Court
Justice Megan K. Cavanagh

Writing Sample Josh Zhao

The following is an advisory legal memo that I drafted for Justice Cavanagh as a part of my internship at the Michigan Supreme Court. I was asked to analyze whether a case had enough merit to be granted leave to appeal by the Michigan Supreme Court. This appeal was about two cases that were consolidated upon appeal. The first case relates to a dispute between two partners (Plaintiff and Defendant) in an educational services company (Educational Services Corp.) and its contract with a charter school (Charter School). Plaintiff claims Defendant mismanaged Educational Services Corp in various ways. In the second case, Plaintiff along with Educational Services Corp. (Plaintiff filed the initial suit and Educational Services Corp. joined two months later) sues Defendant for breach of fiduciary duty in the manner of her resignation and her failure to bid on a new contract with Charter School.

I was given the report of a commissioner of the Michigan Supreme Court and the opinions of the lower courts to help me prepare my memo. I wrote the entirety of this legal memo and I have edited it to remove court documentation information. Confidential information has been deleted or redacted appropriately.

This appeal is primarily about Plaintiff's challenge to summary disposition motions by Defendant in two cases. Plaintiff argues in the first case that the trial court erred when denying his motion to amend his complaint a second time and further erred by denying his supplemental answer to the summary disposition motion. Plaintiffs (Plaintiff joins with Educational Services Corp.) argue in the second case that the trial court erred by granting summary disposition to Defendant on res judicata grounds. Plaintiffs additionally argue that Defendant's alternative theory that Plaintiffs lack standing is incorrect and that the trial court erred because it denied the Plaintiffs' supplemental brief to Defendant's summary disposition motion in the second case. Additionally, Plaintiffs challenge the trial court's denial of reconsideration. Since none of these challenges have merit, leave to appeal should be denied.

Facts:

Plaintiff sues Defendant in two cases that were consolidated upon appeal. In the first case, Plaintiff sues Educational Services Corp., Defendant, and other co-defendants for various causes of actions regarding Defendant's supposed mismanagement of Educational Services Corp. Plaintiff motioned to amend his complaint which was granted. Later, Plaintiff motioned to amend his complaint a second time which was denied. An emergency motion to supplement Plaintiff's answer to Defendant's motion for summary disposition was not formally granted nor denied by the court. Ultimately, the trial court granted summary disposition to all defendants. In the second case, Plaintiff along with Educational Services Corp. sued Defendant for breach of fiduciary duty over the way Defendant resigned from Educational Services Corp. so she could start her own company. Defendant then used her new company to compete against Educational

Services Corp. for the contract with Charter School. The trial court denied Plaintiffs' motion for a supplemental brief and granted summary disposition to Defendant on res judicata grounds and on an alternative theory, because Plaintiffs lacked standing. Plaintiffs' motion for reconsideration was denied. The court of appeals affirmed both cases in a per curiam opinion and Plaintiff appeals the final orders in both cases.

Plaintiff and Defendant founded Educational Services Corp. in 2011. Plaintiff had a 49% interest and Defendant had a 51% interest. Plaintiff was the Chief Operating Officer (COO) and Chief Financial Officer (CFO) while Defendant was the Chief Executive Officer (CEO). In 2015, Educational Services Corp. entered a management agreement with Charter School. The agreement's effective date was July 1, 2015 and would terminate on June 30, 2018 if it were not renewed. In July 2016, Defendant removed Plaintiff as COO and CFO, leaving Plaintiff with only his 49% interest stake after Defendant accused Plaintiff of unprofessional conduct. On March 17, 2017, Plaintiff sued Educational Services Corp., Defendant, and other co-defendants. Plaintiff filed a complaint that was later amended with a list of nine grievances against Defendant about her alleged mismanagement of Educational Services Corp. All defendants filed motions of summary disposition between December 2017 and January 16, 2018. On March 14, 2018, a week before the first dispositive motions were to be heard, Plaintiff filed a motion to amend his complaint a second time. This second amended complaint did not add any new claims. On March 21, 2018, the motion to amend was denied. On April 9, 2018, Defendant announced she was going to resign from Educational Services Corp. She proceeded to form a new company and decided to compete with Educational Services Corp. for the contract with Charter School. The dispositive motions were still pending when Defendant resigned. On April 11, 2018,

Defendant's new company submitted a bid for the contract with Charter School. On April 16, 2018, Plaintiff filed an emergency motion to supplement his answer to the dispositive motions. On April 20, 2018, Defendant's summary disposition motion was granted. Plaintiff's emergency motion was not formally granted nor denied but the court determined that it did not change the outcome of the summary disposition motion. Plaintiff did not contest this finding.

Also, on April 16, 2018, Plaintiff filed suit against Defendant on his own behalf and on behalf of Educational Services Corp. alleging Defendant's resignation was a breach of fiduciary duty. Educational Services Corp. formally joined the case as a plaintiff in July 2018. In September 2018, Defendant filed a motion for summary disposition on res judicata grounds and for failure to state a claim. On October 31, 2018, Plaintiffs filed a motion for leave to file a supplemental brief in response to Defendant's summary disposition motion. The motion for a supplemental brief was denied and the motion for summary disposition was granted on res judicata grounds. An alternative theory of standing was presented by Defendant. The trial court said that the Plaintiffs lacked standing to bring a misappropriation claim against Defendant because the suit was derivative in nature. In addition, the trial court said that Plaintiff failed to make a presuit demand required by such a derivative suit and noted that the Plaintiffs did not contest that they failed to meet the written demand requirement. A motion for reconsideration by the Plaintiffs was also denied.

Plaintiff v. Educational Services Corp.

Issue I: Leave to Amend Complaint

Plaintiff argues that the court of appeals erred in affirming the trial court's denial of his motion for leave to amend his second complaint. Plaintiff argues that the second amended complaint was necessary to conform to the facts unearthed by discovery, which included various allegations against defendants. Plaintiff argues leave to amend should be freely given and that there was no undue delay or bad faith and that any bad faith possibly involved or to be found was done by defendants for failure to comply with Plaintiff's requests.

However, Plaintiff's first amended complaint was nearly identical to his second amended complaint. The nine counts were titled identically. The court of appeals determined that the few substantive changes that Plaintiff did make from the first amended complaint to the second amended complaint would not have been enough to defeat a summary disposition motion. The trial court did not abuse its discretion in denying Plaintiff's request. *See Ronnisch Constr. Grp., Inc. v. Lofts on the Nine, LLC*, 499 Mich. 544, 552; 886 N.W.2d 113 (2016). As a result, this challenge is without merit.

Issue II: Supplemental Answer to Summary Disposition Motion

Plaintiff argues that the court of appeals erred in affirming the trial court's denial of his emergency supplemental answer to defendants' motions for summary disposition. Plaintiff argues that the facilitation ordered by the court was not completed in time and that he wanted the facilitation to continue but defendants refused so defendants could claim that the facilitation was completed. Plaintiff also argues that Defendant breached her fiduciary duty by not bidding on a contract with Charter School before resigning and claims that Defendant was attempting to

circumvent her responsibilities so she could compete against Educational Services Corp. in the future.

However, the record shows that Plaintiff did not file an emergency supplemental answer but rather filed an emergency motion with a proposed supplemental answer attached. The trial court did not expressly deny the motion. However, by not expressly granting it, a supplemental answer was solely filed as an attachment to the motion. Notwithstanding that, the trial court expressly stated that they considered the factual allegations in Plaintiff's supplemental brief and concluded that these allegations did not change the outcome of the case. The court of appeals affirmed this understanding by the trial court. Plaintiff does not contest that the outcome would not have been different even if the emergency supplemental answer were properly filed, so this challenge is without merit.

Plaintiff v. Defendant

Issue III: Res Judicata/Standing

Plaintiffs argue that Defendant failed to establish res judicata which means summary disposition should not have been granted. Plaintiffs argue that Plaintiff and Educational Services Corp. could not have sued Defendant together in the first case because Plaintiff did not have operational control over Educational Services Corp. at that time. Plaintiffs also argue that the two cases concerned different issues as the issue in the first case was about compliance with an operating agreement while the issue in this case is related to Defendant's resignation from Educational Services Corp. Plaintiffs argue that the issues presented here could not have been resolved in the prior case.

As the court of appeals noted below when referring to *Duncan v. Michigan*, “there are four essential elements for res judicata: (1) the prior action was decided on the merits, (2) the prior decision was final, (3) both actions involve the same parties or their privies, and (4) the claims to be precluded either were or could have been decided in the prior action.” 300 Mich. Ct. App. 176, 194; 832 N.W.2d 761 (2013).

The first two elements are satisfied since summary disposition is considered a final decision based on the merits. The third element is satisfied since Plaintiff, Defendant and Educational Services Corp. were all parties in the prior case. The issue at hand is just the fourth element of whether the claims could have been decided in the prior case. This Court “has taken a broad approach,” embracing the “transactional” test, under which res judicata “bars not only claim already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.” *Adair v. State*, 470 Mich. 105, 121, 124; 680 N.W.2d 386 (2004). The claims in this case could have been resolved in the first case because the claims in both cases relate to Defendant’s actions or purported inaction regarding Educational Services Corp. Plaintiff and Educational Services Corp. both admit that the claims in this case arose before the first case had been completed and that they failed to amend their initial complaint in the first case to add these claims. The court of appeals found these claims to be practically similar and since they involved the same parties, they could have formed a “convenient trial unit.” The court of appeals held that this satisfied the fourth element under *Duncan* and the transactional test under *Adair*. Plaintiffs fail to develop an argument that the transactional test was misapplied so all the elements of res judicata have been satisfied as stated by the court of appeals. This challenge is without merit.

In response to the alternative theory of lack of standing presented by Defendant, Plaintiffs argue that they have standing because a suit brought by a corporation against a former owner who was also a managing member is not inherently a derivative suit. Plaintiffs also claim that Plaintiff sued on behalf of himself as well as on behalf of Educational Services Corp. However, injury to a corporation must be remedied through a suit brought by that corporation or derivatively by shareholders on behalf of the corporation. An individual may only personally recover if he shows a direct breach of a duty to him, not just because damage to a corporation happened to damage the individual as well. *Mich. Nat'l Bank v. Mudgett*, 178 Mich. Ct. App. 677, 679-80; 444 N.W.2d 534 (1989). To bring a suit on behalf of a corporation, there must be a 90-day automatic stay from the date of the demand. However, Plaintiffs argue that they would have been deeply harmed if they waited that length of time, so they were forced to file the second lawsuit. Plaintiffs also argue that Plaintiff had a direct claim because he was harmed through the loss of distribution caused by Defendant's failure to file a bid for the contract with Charter School on Educational Services Corp.'s behalf.

The court of appeals did not address the standing argument, but the circuit court noted that Plaintiff failed to show that he did not receive a distribution commensurate with the operating agreement. Nonetheless, Educational Services Corp. joined as a party of its own right after Plaintiff took over operational control so this should resolve any standing issues. If this Court upholds the res judicata holding of the court of appeals, standing does not need to be considered as it would not change the outcome of the case. If this Court decides to reverse the res judicata determination, then the issue of standing should be remanded to the court of appeals for

consideration. This Court does not need to determine whether Plaintiffs have standing so this challenge is without merit.

Issue IV: Supplemental Answer to Dispositive Motion

Plaintiffs argue that the court of appeals erred in affirming the trial court's denial of Plaintiffs' motion to supplement their answer to Defendant's motion for summary disposition. While Plaintiffs' facts and arguments in the supplemental answer support Plaintiffs' claims, the case was decided on res judicata grounds. Nothing in the supplemental brief had any impact on the res judicata issue. Therefore, this challenge is without merit.

Issue V: Reconsideration

Plaintiffs argue that the trial court abused its discretion by denying their motion for reconsideration of the trial court's order granting summary disposition. However, a trial court's decision to grant or deny a motion for reconsideration is reviewed for an abuse of discretion. *Woods v. SLB Prop. Mgmt*, 277 Mich. Ct. App. 622, 629; 750 N.W.2d 228 (2008). Plaintiffs raise the issue of privity, but since they could have raised this argument in front of the trial court, there was no abuse of discretion in denying reconsideration. *See id.* at 630. If the case were reversed on the determination of res judicata and standing, the case would be remanded to the trial court and reconsideration would be moot regardless. This challenge is without merit.